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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re O.B., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Appellant, v. O.B., Defendant and Appellant.	A153432 (San Francisco County Super. Ct. No. JW 17-6255)

O.B. appeals after the juvenile court sustained the allegations of a wardship petition (Welf. & Inst., § 602) alleging that he committed the offenses of carjacking, second degree robbery, receiving stolen property and taking/driving a vehicle without permission. (Pen. Code, §§ 215, subd. (a), 211, 496d, subd. (a); Veh. Code, § 10851, subd. (a).) He contends: (1) the evidence was insufficient to support the true findings; (2) he was deprived of due process because the same judge presided over the detention and jurisdictional hearing and reviewed material in the detention report before making a jurisdictional finding; and (3) the finding on the receiving stolen property count must be

set aside because it is based on the same stolen property as the carjacking and robbery.[1] We reverse the adjudication for receiving stolen property but otherwise affirm.[2]

I. BACKGROUND

On the night of October 9, 2017, Guohua Wu was standing outside his 2015 Lexus, which was parked on the corner of Bowdoin Street and Felton Street. His girlfriend, Qiping Tan, and her mother were sitting in the back seat. Wu got into the back seat, behind the driver's seat. Both doors were open.

Wu noticed a young man wearing a black sweatshirt approaching with a mask covering the bottom half of his face. He walked to the driver's side, over to the passenger's side, and then back over to the driver's side. Wu asked the person what he was doing and stepped out of the car. The person put Wu in a headlock and another person wearing a white sweatshirt approached the passenger side door. Tan described the young man on the driver's side as 15 or 16 and saw the headlock; she also saw him put his hands in Wu's pocket. She also saw the person in the white sweatshirt.

The two men got into the car and drove it away very fast. Wu, who also discovered his wallet containing $700-800 missing, called 911. Police responded to the call at 11:11 p.m. At 11:19 p.m., Officers Coyne and Gong saw the white Lexus drive in the opposite direction about 3-4 blocks from where it was stolen. The officers turned their patrol car around and activated their emergency lights; the Lexus accelerated through several stop signs before crashing into an electrical pole at 11:20 p.m.

Officer Coyne saw Daniel K. running away from the passenger side of the crashed car. Daniel had a laceration on his forehead and over $603 in his clothing. Appellant was detained by officers a few blocks away, and was out of breath and sweaty like he had been running. He told officers he "ran away from where the accident happened at." An

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[1] Appellant has withdrawn his claim that the taking/driving a vehicle count must be reversed as a lesser and necessarily included offense of robbery.

[2] We deny by separate order the related petition for writ of habeas corpus in *In re O.B.*, on habeas corpus, A155240.

officer who traced a route from the point of detention to the crash site found a black hooded sweatshirt on the grass near a concrete wall, which appellant identified as his.

Wu was taken to a "cold show" and could not identify appellant as the person who had stolen his car, though he had a similar body shape and eyes as the person in the black sweatshirt. Tan and her mother were also unable to identify appellant or Daniel K. at the cold show.

Another carjacking involving "five black male adult[] subjects on Felton and Dartmouth Street," approximately one block away from where Wu's Lexus was stolen, was reported at 11:28 p.m. that same night. When Wu first reported the carjacking to 911, he said there had been three subjects rather than two, and that they were between 20 and 30 years old.[3]

Based on this evidence, the juvenile court found that appellant was a ward of the court under Welfare and Institutions Code section 602 because he had committed the criminal offenses of carjacking, robbery, receiving stolen property and taking/driving a vehicle. It declared all of these offenses to be felonies and placed appellant on probation in the custody of his mother. The court declared Daniel K. to be a ward but sustained only the allegation that he had committed the offense of receiving stolen property, a misdemeanor.

II. DISCUSSION

A. *Sufficiency of the Evidence*

Appellant contends the judgment must be reversed because the evidence was insufficient to show he took the car from Wu's presence or took or drove Wu's car. He notes that Wu initially reported the car had been taken by three men who were significantly older than the defendants, that no one ever saw appellant driving the car,

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[3] At the jurisdictional hearing, Wu acknowledged that appellant and Daniel K. were much younger than 20 to 30 years of age, but stated his initial description was based on the racial difference between him and the young men who stole his car. He explained that when he had initially told police three men stole his car, he was referring to the number of victims.

that appellant had no injuries after the crash even though Daniel K. had a large facial laceration, that Wu described Daniel as taller than the robber in the black sweatshirt when he was actually shorter than appellant, that Tan described the sweatshirt worn by the robber as having a zipper and no markings, whereas the black sweatshirt found by police had no zipper and pictures on it, that five men hijacked another vehicle that night within blocks of where Wu's car was taken, and there was an eight-minute gap between the time the car was taken and the time it was first seen by police three to four blocks away. We disagree this makes the evidence legally insufficient.

The factual findings of a juvenile court in a delinquency case are reviewed for substantial evidence. (See *In re Paul C.* (1990) 221 Cal.App.3d 43, 52.) This standard is "highly deferential." (*People v. Lochtefeld* (2000) 77 Cal.App.4th 533, 538.) Our task is to " ' "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence[.]" ' " (*People v. Alexander* (2010) 49 Cal.4th 846, 917.) "Although we must ensure the evidence is reasonable, credible, and of solid value," we must keep in mind "it is the exclusive province of the trial judge . . . to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.) " 'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment. . . .' Unless it describes facts or events that are physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Elliott* (2012) 53 Cal.4th 535, 585.)

Wu and Tan's testimony at the jurisdictional hearing amply supports a finding that Wu's car was taken from his presence by two young men and crashed a short while later. That appellant was found sweating and out of breath in the area of the accident, and admitted to police that he ran from the accident, was strong circumstantial evidence he was the perpetrator. The evidence that a black hooded sweat shirt similar to that worn by the robber was found discarded between appellant's location and that of the accident, and that appellant admitted owning the sweatshirt, added to the evidence against him. While there were inconsistencies between appellant and Wu's description of the men who took

his car, this did not render the evidence legally insufficient. Appellant's "extensive discussion regarding the inconsistencies" in the People's evidence "primarily goes to the weight" of that evidence and does not render the evidence "necessarily incredible or otherwise insubstantial." (*People v. Millard* (2009) 175 Cal.App.4th 7, 43.)

B. *Consideration of Detention Report*

Appellant complains he was deprived of due process because the same judge presided over both the detention hearing and the contested jurisdictional hearing in this case. He contends he was prejudiced because the detention report contained evidence concerning his poor performance at school and statements made by him on the night of the offense in which he admitted crashing the stolen car, evidence which was not admissible at the jurisdictional hearing.[4] We reject the claim.

It has long been the rule that a juvenile court may not read or consider any portion of a probation report until after it makes its jurisdictional findings. (See *In re Gladys R.* (1970) 1 Cal.3d 855, 860 (*Gladys R.*); Cal. Rules of Court, rule 5.780(c) ["Except as otherwise provided by law, the court must not read or consider any portion of a probation report relating to the contested petition before or during a contested jurisdictional hearing"].) The purpose of this rule "is to prevent the making of jurisdictional findings based on irrelevant negative information contained in the probation report. [Citation.]" (*In re Christopher S.* (1992) 10 Cal.App.4th 1337, 1345 (*Christopher S.*).)

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[4] The detention report stated in part, "MINOR'S STATEMENT: [¶] This officer has read [O.B.] his Miranda rights. [O.B.] said that he was arrested for taking a car. He said that he crashed the car while the police were chasing him and a friend. He said that his friend 'fucked his head open' in the crash and is at the hospital. [O.B.] said that it was only the two of them in the car. [O.B.] said that the car was parking, and no one was in the car. He said that his friend told him to take the car, so they took it. It took about five minutes for the police to find them, and [O.B.] was driving, and ran from the police because he was scared." Under "SCHOOL HISTORY," the report states, "According to school records obtained on October 11, 2017, [O.B.] is a special education student in the 8th grade at Willie Brown Middle School. He holds a GPA of 0.81. [O.B.] qualifies for special education due to 'Other Health Impairment.' Specifically, his [individual educational plan] notes that [O.B.]'s 'attendance and aggressive behaviors further complicate his access to the general education curricula. . .' So far this school year, [O.B.] has accumulated 85 unexcused absences."

The same judge conducted both the detention and the jurisdictional hearings in this case and therefore read the detention report before holding the jurisdictional hearing. Appellant failed to object to this procedure. There is a split of authority as to whether appellant forfeited any claim of error. (Compare *Gladys R.*, *supra*, 1 Cal.3d at pp. 861–862 [failure to object to premature consideration of social study did not waive issue on appeal]; *In re D.J.B.* (1971) 18 Cal.App.3d 782, 784–785 (*D.J.B.*) ["review by the juvenile court of a probation report or social study prior to or during the jurisdictional hearing constitutes prejudicial error even though no objection is made at the juvenile court hearing to the court's premature use of such report or social study"]; with *Christopher S.*, *supra*, 10 Cal.App.4th at pp. 1344–1345 [court erred in prematurely reading probation report, but error waived by failing to object].)

We conclude the better reasoned view is that the error must be raised to the juvenile court or the issue is forfeited on appeal. (*Christopher S.*, *supra*, 10 Cal.App.4th at p. 1345.) We agree with *Christopher S.* that *Gladys R.* did not obviate the general rule requiring objections to preserve an issue on appeal, and that the sole reason there for excusing the minor's failure to object was that it would have been unfair to expect the attorney to "anticipate that an appellate court will later interpret the controlling sections in a manner contrary to the apparently prevalent contemporaneous interpretation." (*Gladys R.*, *supra*, 1 Cal.3d at p. 861; *Christopher S.*, *supra*, 10 Cal.App.4th at pp. 1344–1345.) *D.J.B.* extended the fact-specific holding of *Gladys R.* to every case in which the juvenile court prematurely considered a probation report, even those cases in which the error occurred after the error was clear under *Gladys R.* (*D.J.B.*, *supra*, 18 Cal.App.3d at pp. 784–785.)

Appellant offers no persuasive reason why the normal forfeiture rule should not apply to the situation before us. (See *People v. Scott* (1997) 15 Cal.4th 1188, 1207 [finding a waiver where the party failed to raise an objection seeking a judge's disqualification at the first opportunity].) By failing to timely object, appellant has forfeited his contention that the trial court deprived him of due process by conducting the

adjudicatory hearing after considering prejudicial information in the detention report. (*Christopher S.*, *supra*, 10 Cal.App.4th at p. 1345.)

Appellant alternatively contends his trial counsel was ineffective for failing to object. Again we disagree. To prove ineffective assistance of counsel, a defendant must show that "counsel's representation fell below an objective standard of reasonableness . . . [¶] . . . under prevailing professional norms." (*Strickland v. Washington* (1984) 466 U.S. 668, 688 (*Strickland*).) " ' " 'Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." ' [Citations.] . . . [W]e have explained that 'courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight' [citation]. 'Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts.' " ' [Citation.]" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 86.) When " ' "the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged," ' " the claim cannot be considered on appeal. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) The only exceptions are when " ' "counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." . . .' [Citations.]" (*Ibid.*)

Ordinarily, the proper way to raise an ineffective assistance challenge based on the failure to object to having the same judge preside over both the detention and jurisdictional hearing claim is by petition for writ of habeas corpus, not appeal, because a trial counsel's acts or omissions are typically motivated by considerations not reflected in the record. (See *In re Darlice C.* (2003) 105 Cal.App.4th 459, 463.) Here, the record sheds no light on why appellant's counsel failed to pursue disqualification procedures, and we can readily think of at least one potential tactical reason: counsel might have believed the jurist who heard the jurisdictional hearing was a desirable fact-finder, even if he had presided over the detention hearing and read that report. We will not reverse on this record.

In addition, the defendant must affirmatively establish prejudice by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra,* 466 U.S. at p. 694.) Thus, without a showing of some type of prejudice, defense counsel's failure to move for disqualification cannot be the basis of a valid claim for ineffective assistance of counsel. In a nonjury trial, where the judge is tasked with the responsibility of ruling on the admissibility of evidence, there is a strong presumption that the judge disregarded inadmissible evidence and decided the matter from a consideration of the relevant and admissible evidence. (See *People v. Crittenden* (1994) 9 Cal.4th 83, 151–152 [a reviewing court assumes the court was not improperly influenced by inadmissible material, absent evidence in the record to the contrary]; *People v. Coddington* (2000) 23 Cal.4th 529, 644–645, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13. [while trial court erroneously read probation report before ruling on automatic application for modification of death verdict, "[a]bsent evidence to the contrary the court will assume that the judge was not influenced by the material"]; *People v. Farnam* (2002) 28 Cal.4th 107, 196 [same]; see also *In re James B.* (2003) 109 Cal.App.4th 862, 874–875.) Indeed, even laypeople on a jury (presumably less familiar with the legal system, and with compartmentalizing evidence than a judge) are ordinarily presumed to follow instructions and disregard inadmissible evidence. (*Greer v. Miller* (1987) 483 U.S. 756, 767; *People v. Navarrete* (2010) 181 Cal.App.4th 828, 834.)

There is nothing in this record indicating the judge presiding over appellant's jurisdictional hearing was biased or prejudiced by any of the information found in the detention report. The judge did not allude to the detention report during his determination of the evidence in the contested jurisdictional hearing. Appellant's school attendance record, set forth in the detention report, has nothing to do with the offenses charged. And even if the judge had considered the detention report, with its indication that appellant had acknowledged driving the car, he would have also heard testimony at the jurisdictional hearing that appellant admitted running from the accident and owning a

black hooded sweatshirt consistent with what the victims described the driver as wearing. Moreover, this is not a case where the facts are so extreme that "even if actual bias is not demonstrated, the probability of bias on the part of a judge is so great as to become 'constitutionally intolerable.' [Citation.]" (*People v. Freeman* (2010) 47 Cal.4th 993, 1001.)

We therefore reject the argument that appellant is entitled to reversal because the same judge presided over the detention hearing and the jurisdictional hearing and considered the detention report in advance of the jurisdictional hearing.

C. *Receiving Stolen Property*

As the Attorney General concedes, the receiving stolen property count (Pen. Code, § 496d, subd. (a)) was based on the same stolen property—Wu's 2015 Lexus—as the robbery and carjacking counts. A criminal defendant cannot be convicted of both carjacking and receiving stolen property, or of robbery and receiving stolen property, when the same property underlies both offenses. (*People v. Magallanes* (2009) 173 Cal.App.4th 529, 536; *People v. Stephens* (1990) 218 Cal.App.3d 575, 577, 587; see Pen. Code, § 496, subd. (a).) The same principle is applicable in juvenile adjudications. (*In re Kali D.* (1995) 37 Cal.App.4th 381, 384–385, disapproved on other grounds in *People v. Allen* (1999) 21 Cal.4th 846, 861, fn. 16.) We will reverse the receiving stolen property count.

III. DISPOSITION

The receiving stolen property count (Pen. Code, 496d, subd. (a)) is reversed. As so modified, the judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P.J.

BURNS, J

(A153432)